

Introduction

Die Zeit, the German weekly, called it the “last great Nazi war crimes trial,” a designation that misled on almost every count.¹ The defendant stood accused of assisting the SS in the murder of 28,060 Jews at the Sobibor death camp—but not of being a Nazi. Nor did the trial involve war crimes, since the systematic extermination of unarmed men, women, and children was not an act of war. Then there was the question of “greatness.” By all accounts, the defendant, John (Ivan) Demjanjuk, had been little more than a peon at the bottom of the Nazis’ exterminatory hierarchy. Compared with Nuremberg, where twenty-one leaders of the Nazi state faced an international military tribunal, or with the Jerusalem trial of Adolf Eichmann, logistical mastermind of a continent-wide scheme of deporting Jews to their death—or even with the French trial of Klaus Barbie, the so-called Butcher of Lyon—the proceeding against Demjanjuk looked almost inconsequential. Add the fact that the defendant was at the trial’s start a near nonagenarian, seemingly in frail health, and that sixty-seven years had elapsed since his alleged crimes, and the most remarkable aspect of the trial was the fact that it was staged at all. All the same, in putting Demjanjuk on trial, German prosecutors had assumed a radical risk. An acquittal would have been disastrous, a highly visible and final reminder of the failure of the German legal system to do justice to Nazi-era crimes. For *Die Zeit* was almost surely right on one count: whatever else one might say about the case, it was likely to be the *last*, or at least the last Holocaust trial to galvanize international attention.

Even the flood of attention had less to do with Demjanjuk's personal notoriety and more to do with the awkward fact that he had previously been mistaken for a truly notorious figure. Demjanjuk's legal odyssey traced back to 1975, when American officials first received sketchy word of the wartime activities of a Ford machinist living in a quiet suburb of Cleveland. Demjanjuk had been born in the Ukraine in 1920 and had entered the United States in 1952, settling in the Cleveland area and becoming a naturalized US citizen in 1958. By the late 1970s, American prosecutors had identified him as the former Treblinka guard whose wanton acts of sadism had earned him the fearful sobriquet Ivan Grozny, "Ivan the Terrible." In the most highly publicized denaturalization proceeding in American history, Demjanjuk was stripped of his citizenship and extradited to Israel, where he was tried as Treblinka's Ivan Grozny. Convicted in 1988 and sentenced to death, Demjanjuk idled in an Israeli prison for five years, while his appeals ran their course. Then, in the summer of 1993, the Israeli Supreme Court tossed out his conviction, after newly gathered evidence from the former Soviet Union showed the Israelis had the wrong Ivan. Demjanjuk returned to the United States a free man, ending one of the most famous cases of mistaken identity in legal history.

But it hardly spelled the end of Demjanjuk's legal travails. Resettled in suburban Cleveland with his American citizenship restored, Demjanjuk became the subject of a fresh denaturalization proceeding. While Demjanjuk might not have been Treblinka's Ivan the Terrible, evidence showed that he had nonetheless been a "terrible enough Ivan" who served at Sobibor, an equally lethal Nazi death camp. In 2001, Demjanjuk earned the distinction of being the only person in American history to lose his citizenship twice. Still protesting his innocence, he remained barricaded in his middle-class ranch house in Seven Hills, Ohio, while American officials searched fruitlessly for a country willing to accept him. After Poland and Ukraine declined, Germany, which had long resisted accepting alleged Nazi collaborators from the United States, somewhat surprisingly said yes. Demjanjuk was flown to Munich, arriving on German soil on May 12, 2009.

Two years later to the day, on May 12, 2011, a German court convicted the by-now ninety-one-year-old defendant of assisting the SS in the murder of 28,060 Jews at Sobibor. But punishment would never be

meted out: ten months later, with his appeal still pending, John Demjanjuk died in a Bavarian nursing home. It was perhaps fitting that the most convoluted, lengthy, and bizarre criminal case to arise from the Holocaust never reached a definitive conclusion.

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In the following pages, we will explore the elaborate and strange story of Demjanjuk's legal odyssey. But for all its extraordinary twists and turns, the Demjanjuk case also places deeper, more persistent claims on our attention. It asks us to think critically about the justice of trying old men for superannuated crimes. It invites us to reflect on the nature of individual responsibility in the orchestration of state-sponsored crimes. It demands that we think carefully about the nature, causes, and possible justifications of collaboration in the perpetration of atrocities. And it provides a crucible in which three distinct national legal systems—the American, the Israeli, and the German—sought to create legal alloys potent enough to master the legal challenges posed by the destruction of Europe's Jews.

Using criminal prosecutions to address that destruction severely tested traditional conceptions of law and jurisprudence. The law typically views criminal acts *microscopically*. The standard model, dutifully studied by law students around the globe, construes crimes as deviant acts committed by individuals against other individuals that harm community order. Different legal systems reach different conclusions about which specific acts constitute such a threat, but all legal codes condemn foundational wrongs such as murder, and instruct the modern nation-state to respond aggressively, mobilizing and deploying its investigatory and judicial resources to apprehend, prosecute, and ultimately punish perpetrators. In Thomas Hobbes' *Leviathan*, arguably the greatest work of Western political thought, the state is more than simply the bulwark of order; it is the force that protects us from the mortal violence of strangers. And in John Locke's *Two Treatises of Government*, the state both defends law and submits to its neutral dominion.

Nazi crimes exploded this model and its assumption that private violence represented the most basic threat to the fabric of social life. Nazism revealed the terrible capacity of the state itself to turn reprobate, a phenomenon the German philosopher Karl Jaspers designated with the

term *Verbrecherstaat*, “the criminal state.”² This idea—that the state, far from acting as the locus and defender of law and order, might itself commit the worst acts of criminality—simply lay beyond the ken of the conventional model of criminal law and was indeed unintelligible to it. Jaspers’ term named the novel achievement of Nazism, how it turned the state into the principal perpetrator of crimes, the very agent of criminality.³ In the peroration of his opening address at Nuremberg, chief American prosecutor Robert Jackson framed the legal challenge posed by the *Verbrecherstaat*: “Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance.”⁴

The Nuremberg trial and its progeny offered a distinctive answer to this question. Nuremberg insisted that law *was* adequate to the task, but that the effort would require extraordinary legal innovations. Mastering the crimes of the *Verbrecherstaat* would require special courts, new jurisdictional principles, unorthodox evidentiary conventions, and, most of all, novel categories of wrongdoing. These new categories would have to be sufficiently flexible and capacious to handle crimes that spanned a continent, enlisted the participation of tens of thousands of perpetrators, and were supported by a complex organizational and logistical apparatus.

The prosecution of the major Nazi war criminals before the International Military Tribunal (IMT) in Nuremberg marked a crucial first step. Nuremberg was not in the first instance a Holocaust trial; the twenty-one defendants in the dock were principally charged with “crimes against peace”—that is, of having planned and launched a war of aggression in violation of international law. Yet the trial conferred judicial recognition on “crimes against humanity,” as it called acts of state-sponsored atrocity; and the prosecution used this novel legal channel to bring much of the evidence of the Holocaust before the IMT. American prosecutors subsequently built on this precedent in the twelve so-called successor trials staged by the US military, also at Nuremberg. In these trials of leading German state and economic functionaries, American prosecutors shifted away from the IMT’s focus on aggressive war and now treated crimes against humanity as the Nazis’ central offense.

Nazi atrocity prodded the legal imagination to recognize a second novel incrimination. In a book published in 1944, *Axis Rule in Occupied Europe*, Raphael Lemkin, a Polish-Jewish adviser to the US War Department, coined a new term to describe the Nazis' treatment of Jews in occupied countries. Wedding an ancient Greek word for group (*genos*) to a Latin word for killing (*cide*), Lemkin's neologism sought to describe something distinct from mass murder, and more grave: "a coordinated . . . destruction of the essential foundations of the life of . . . groups, with the aim of annihilating the groups themselves."⁵ The newly coined word *genocide* made its way into the IMT indictment, then gained far greater currency in the Americans' successor trials at Nuremberg, where it served to characterize the Nazis' crimes against humanity. On December 9, 1948, the United Nations General Assembly voted to recognize genocide as denoting its own independent crime in international law. The Convention on the Punishment and Prevention of the Crime of Genocide officially entered into force early in 1951; 144 states have since ratified the Convention, and today genocide stands, in the words of William Schabas, as the "crime of crimes"—the most serious crime recognized by any legal code.⁶

The effort to punish Nazi atrocity also gave rise to novel jurisdictional principles capable of puncturing the shield of sovereignty that traditionally insulated state actions from outside legal scrutiny. Likewise it stimulated the development of specialized investigatory units that revolutionized the role that professional historians would play in preparing criminal cases. It led jurists to experiment with flexible rules of evidence equipped to facilitate rather than frustrate the prosecution of state-sponsored crimes. And it sparked the establishment of special courts, some international, some domestic, specially tasked with trying crimes of genocidal sweep. In large measure, the field that we now call "international criminal law" owes its existence to the law's attempt to grapple with Nazi mass atrocity.

Not all legal systems embraced what I shall call the "atrocity paradigm"—the use of special law and processes to respond to Nazi crimes. As we shall see, Germany, spurred by resentment of the Allies' war crimes trial program, rejected the new incriminations designed to facilitate the prosecution of Nazi exterminators. But even where these

legal innovations gained acceptance, they encountered an even more fundamental problem raised by the atrocities of the *Verbrecherstaat*. In the classic model of retributive punishment that found its most enduring exposition in the works of Kant, punishment is seen as a *just dessert*. In this view, punishment is something the criminal has *earned*; its purpose is not to rehabilitate or correct the wrongdoer, but to restore the moral imbalance caused by his crime. Nazi atrocity introduced a radical disequilibrium into this Kantian equation. Writing about the Nuremberg trial, Hannah Arendt famously observed, “For these crimes, no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters all legal systems. . . . We are simply not equipped to deal, on a human level, with a guilt that is beyond crime.”⁷ Years later, Israeli Attorney General Gideon Hausner would make much the same point during the Eichmann proceeding, openly acknowledging that “it is not always possible to apply a punishment which fits the enormity of the crime.” The problem of the inadequacy of punishment was hardly a trivial matter; to the contrary, as Arendt suggested, it raised profound jurisprudential questions. Incriminations such as “crimes against humanity” and “genocide” may have enabled prosecutions of perpetrators of Nazi atrocity, but if such crimes exploded classic theories of retributive justice, then what purpose exactly did the trials serve? As Arendt understood it, the problem was not that the law would fail to do justice to the defendants; instead, it was that no juridically sanctioned punishment could serve as a coherent response to mass atrocity. Such crimes exposed the limits of law as a retributive scheme.

In an earlier book, I argued that jurists sought to solve this dilemma by reconfiguring the basic purpose of the atrocity trial.⁸ In researching the records of Holocaust trials, I was struck by the fact that numerous prosecutors defended the proceedings as *didactic* or *pedagogic* exercises. Attorney General Hausner was explicit in this regard; in his account of the Eichmann trial, he insisted, “we needed more than a conviction; we needed a living record of a gigantic human and national disaster.”⁹ Hausner’s words were hardly anomalous; American prosecutors at Nuremberg, German prosecutors at the famous Frankfurt-Auschwitz trial (1963–65), and French prosecutors at the Barbie trial (1987) sounded many of the same chords. In these cases, jurists explicitly sought to use

the trial as a means of teaching history, creating narratives from which political lessons could be teased. In calling such cases *didactic trials*, I intended no criticism, and in fact sought to distinguish such legal exercises from the corrupt *show trials* staged in the Soviet Union under Stalin. My deeper argument was that far from being an incidental feature of Holocaust trials, the didactic aspect represented a juristic solution to a juristic problem. If Nazi atrocity revealed the limits of the conventional criminal trial as a retributive exercise, the didactic trial delivered an expanded justification for prosecuting. While the atrocity trial would continue to perform the conventional function of ascertaining guilt and assigning punishment, it would also serve to teach history and history lessons.

The atrocity trial as didactic exercise has not escaped criticism. Oddly and disappointingly, the most influential critic was Arendt herself, who, in her famous report on the Eichmann trial, first published in the *New Yorker* in 1962 and a year later in book form, vehemently attacked Hausner's prosecutorial tactics. "The purpose of a trial," Arendt insisted, "is to render justice, and nothing else; even the noblest of ulterior motives—the making of record of the Hitler regime which would withstand the test of history' . . .—can only detract from the law's main business: to weigh the charges against the accused, to render judgment, and to mete out due punishment."¹⁰ In making this argument, Arendt appeared to forget what she had written about Nuremberg—that Nazi atrocities had so distorted the fabric of justice that no amount of "due punishment" would suffice to "render justice." While Arendt was certainly correct that a criminal trial must first and foremost fairly weigh the evidence against the accused, her dismissal of all other purposes betrayed an odd shortsightedness. Far from serving merely "ulterior motives," the didactic trial represented a solution to the *very problem that Arendt herself first identified*.

The atrocity trial as didactic exercise reached its purest elaboration in the Eichmann trial. Everything about the case was unusual, beginning with Eichmann's spectacular capture and kidnapping by Mossad agents, who plucked the former SS *Obersturmbannführer* off a street in suburban Buenos Aires. At trial, Israel relied on unusual jurisdictional theories to buttress its authority to try a man whose crimes had been committed on a different continent before the birth of the Israeli state. It also used a special charging statute, the Nazis and Nazi Collaborators

(Punishment) Law, passed by the Knesset in 1950, that incorporated into domestic Israeli law both Nuremberg's definition of "crimes against humanity" and a modified version of the United Nations' definition of genocide. The three-judge tribunal that presided over the trial was a special court, specially constituted to try persons accused under the 1950 statute. And the trial itself presented a drama of legal didactics, undertaking to teach history through the lived memory of survivor witnesses. This effort represented a dramatic departure from Nuremberg, where prosecutors had relied on documentary evidence largely to the exclusion of victim and survivor testimony. Many observers had questioned Nuremberg's documentary approach, as a trial that aimed to serve as the "greatest history seminar" became dull, repetitive, and tediously long. The Eichmann prosecution sought to correct this misstep. By presenting history through the anguished memory of survivors, the trial turned a younger generation of Israelis into witnesses of the witnesses. It conferred honor and public recognition on the experience of survivors, and communicated to younger Israelis the existential perils that menaced the Jewish people. It delivered a comprehensive and gripping account of the Holocaust while casting Zionist self-sufficiency and military preparedness as the necessary bulwarks against the repetition of any such catastrophe. At the same time, it galvanized attention around the world, particularly in America and Germany, and so began the work of transforming collective understandings of the Holocaust—which in time would come to be seen not merely as a horror of World War II, but as the signature event of the twentieth century.

If the Eichmann trial represented the Holocaust trial in its purest form as a didactic exercise organized around survivor testimony, Demjanjuk's "Ivan the Terrible" trial in Jerusalem represented the collapse of the paradigm. While the causes of this disastrous case of misidentification were, as we shall see, far from straightforward, the calamitous trial made abundantly clear the perils of didactic legality, showing how the desire to honor the lived memory of survivors of atrocity can easily lead a criminal court badly astray. The collapse of the Israeli case against Demjanjuk also exposed the limits of the American approach to dealing with Nazi crimes, an approach that differed dramatically from the atrocity model I have sketched above.

American jurists had been the pioneering force at Nuremberg and in years immediately afterward gathered a store of experience in trying former Nazis—not just in Nuremberg, but also at the site of the former Dachau concentration camp, where the US Army tried hundreds of former camp guards and other Nazis for war crimes and crimes against humanity before specially constituted military commissions. By the 1970s, however, when American jurists began dealing with the problem that Eric Lichtblau has called “the Nazis next door,” this institutional memory had faded. The bold legal creativity that American jurists showed at Nuremberg was either ignored or forgotten. Lawyers of the 1970s simply assumed that US courts lacked jurisdiction over Nazi crimes; with the very laws that Americans had pioneered at Nuremberg unavailable, jurists were left addressing our domestic Nazi problem with ordinary legal tools. Former Nazis and Nazi collaborators who had acquired American citizenship would only face civil charges, arising under immigration law. Those like Demjanjuk—persons alleged to have perpetrated or served as accessories to mass crimes—were simply handled as persons who had entered the country illegally or under false pretenses. These denaturalization trials had little in the way of a didactic component, and few attracted great attention, the one exception being the spectacular Demjanjuk/Ivan the Terrible case. Essentially, the cases served as a means of lustration—they symbolically sought to purge America of persons undeserving of membership in a nation based on tolerance and equality.

In theory, such civil cases should have posed fewer obstacles to prosecutorial success than criminal trials. In point of fact, several botched cases exposed the difficulty of using ordinary legal instruments to handle state-sponsored atrocities. Prosecutors learned that asking aging survivors of profound trauma to accurately identify their past tormentors could prove a perilous undertaking. A deeper problem was institutional, as a decentralized collection of immigration lawyers and local US attorneys struggled to assemble cases against persons alleged to have lied about crimes committed decades earlier in far-flung lands.

This scattered approach, and the mistakes it led to, demonstrated the need for a specialized organization to handle such cases; and the creation of the Office of Special Investigations (OSI) in the Justice Depart-

ment in 1979 represented a critical step toward mastering the legal problems posed by the Nazi next door. Bringing together teams of lawyers and professional historians in unprecedented collaboration, the OSI developed a model for dealing with Nazis that would pay impressive prosecutorial dividends by the mid-1980s. Alas, this model had yet to be adequately developed by the time of Demjanjuk's first denaturalization trial, and the OSI would pay dearly for inheriting its signature case before it was sufficiently equipped to handle it. In denaturalizing Demjanjuk as Treblinka's Ivan the Terrible, the OSI committed a colossal blunder that its later successes—even in the second Demjanjuk denaturalization case—could never fully correct. Institutions managed with competence and integrity develop and learn over time, which is what the OSI did. Yet for the OSI, the course corrections came too late to avoid the early disaster that continued to taint its reputation.

As we shall see, the Cold War also contributed mightily to this early calamity; indeed, the Cold War—both its waging and its dissolution—profoundly affected the course of all Nazi atrocity trials in the United States, Israel, and Germany. The most basic and obvious challenge for jurists lay in gaining access to evidence secured in archives behind the Iron Curtain. But to call the Cold War a complicating backdrop to these cases is too anodyne a characterization; it was, in effect, a major player in them. It fostered doubts about the quality and authenticity of evidence; it shaped institutional responses; it infiltrated rhetoric, inculcated belief systems, and came ultimately to define the realm of action, the structure of political and legal choice. It supplied the very ether through which jurists moved. The end of the Cold War was no less profound in its influence. History by counterfactual is a tricky business, but we can say with some confidence that had the Cold War continued there would have been no second Demjanjuk denaturalization trial in the United States. And there certainly would have been no prosecution in Germany.

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In May 2009, at the time of Demjanjuk's arrival by US government jet in Munich, I was living with my family in Berlin. Within a two-hundred-yard radius of our apartment were three separate monuments

to Nazi atrocity. Embedded in the sidewalk in front of our building was a pair of *Stolpersteine* (literally, “stumbling blocks”), brass cobblestones memorializing two Berlin Jews deported to Auschwitz. Across the street in a small park stood a sculpture of what I first took to be a stack of waffles but that closer inspection revealed to be a pile of stylized corpses (the sculpture was called *Treblinka*). And around the corner, a plaque affixed to an elegant prewar building informed passersby that the building, now home to luxury condos, had formerly housed a military court that condemned thousands of innocent persons to death during the Third Reich.

Politically and culturally, Germany is the poster boy for national self-reckoning, the land willing to face down its monstrous past. Turkey and Japan have yet to accept responsibility for crimes of genocidal sweep. France still struggles with its complicity in Nazi crimes. Austria continues to indulge the myth of the “first victim” of Nazism. Spain, which fancies bringing foreign human rights violators to justice, suddenly becomes prickly when a local magistrate shifts his attention to Franco-era crimes. By contrast, Germany has approached the difficult collective task known as *Vergangenheitsbewältigung*—confronting the past—with Teutonic thoroughness, making its past atrocities the subject of countless memorials, symposia, films, and other public discussions. When all else fails, German law serves as the muscle of memory, stepping in to prosecute Holocaust deniers.

When it came to bringing Nazi perpetrators to the bar of justice, however, the postwar German legal system amassed a pitifully thin record. It is true that in the years directly following the war, German courts operating under the watchful eye of Allied zonal occupiers conducted over forty-six hundred trials of crimes committed during the Nazi period—yet the impressive-sounding number obscures the fact that the majority of these cases involved relatively trivial property crimes committed in the last months of the war, when Germany witnessed a collapse of public order.¹¹ In the early years of the Federal Republic, trials involving Nazi atrocities came to a virtual standstill; in 1955, for example, West German courts convicted a grand total of twenty-one persons for Nazi-era crimes. Early on, East Germany demonstrated greater resolve in pursuing Nazi criminals, but some of these

proceedings amounted to little more than Stalinist shows; later, East Germany lost interest in trials, insisting that most unpunished Nazis remained in the West.¹²

Today, the field known as “transitional justice” asks what role a judicial reckoning with a previous criminal regime should play in the transition to a democratic one. The West German answer was: not much of one. In the Federal Republic, the obstacles to successfully prosecuting former Nazis were many and formidable. Where Nuremberg pioneered the notion that special law and institutions were necessary to do justice to Nazi crimes, Germany insisted on treating Nazi atrocities as ordinary crimes to be treated by ordinary courts applying ordinary German law. As a consequence, German law (here I will use “German” and “Germany” to refer to the Federal Republic; East Germany will be designated as such) often frustrated rather than facilitated prosecutions. Generous amnesty statutes insulated many former Nazis from prosecution, including virtually all the bureaucrats who had helped plan and implement the Holocaust. German prosecutors could not try former Nazis for genocide or crimes against humanity, as these special incriminations were dismissed as *ex post facto* law. Barred from using the very incriminations designed to facilitate the prosecution of Nazi atrocities, German prosecutors had to rely on conventional crimes as defined by German statute. And so the most a prosecutor could do was to charge a former Nazi with ordinary murder. After 1960, murder was the *only* charge that a prosecutor could file, as the statute of limitations had tolled for all other crimes committed during the Third Reich. Even murder was controlled by a prescriptive period, which was lifted only thanks to a series of stopgap measures by a German parliament ultimately unwilling to face the international opprobrium and internal rancor that would have resulted from letting the statute of limitations expire on all Nazi-era crimes.

As we shall see, the fact that German courts had to address acts of genocide through the category of conventional murder created immense problems for prosecutors. Investigations were abandoned mid-stream, charges were brought only to be dismissed, those trials that did go forward often resulted in bewildering acquittals or frustratingly lenient sentences, and the occasional stiff sentence rarely escaped reduction or commutation. Thanks to the peculiarities of German legal doc-

trine, judges treated the Holocaust as if it had been perpetrated by no more than a handful of men—Hitler, Himmler, Heydrich, and Göring, and a few others thrown in for good measure. Everyone else, including SS men who had directly participated in mass shootings or had supervised the exterminatory process, were treated as mere accessories.

We should not be entirely surprised by this record of disappointment. The simple fact is that postwar Germany was full of former Nazis. Many occupied leading positions in the Federal Republic's government and judiciary. Even among those who smoothly adjusted to the new realities of a democratic Germany, few welcomed the aggressive prosecution of their former confederates. There is no denying, then, that the continuing influence of former Nazis contributed to Germany's refusal to use the atrocity model to prosecute Nazi crimes. But this is not to say that all the political, institutional, legal, and doctrinal roadblocks to successful prosecution were exclusively the handiwork of former Nazis. The law is not infinitely pliable, at least not in a liberal democracy; doctrine may accommodate and reflect political interests and partisan agendas, but it also evolves by its own internal logic and rules.

Then there is the matter of institutions. Like the United States, Germany has a federated legal system, one that unavoidably frustrated the centralized, coordinated investigation and prosecution of Nazi atrocities. For some, of course, this was a blessing. But for others it was a national embarrassment—if not a direct scandal. And so a full two decades before the creation of the OSI in the United States, Germany established Die Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen (The Central Office of the Regional Administration of Justice for the Investigation of National Socialist Crimes, hereafter, the Central Office), a special unit empowered to launch investigations of Nazi-era crimes.¹³ In contrast to the OSI's relatively unsexy civil law caseload, the Central Office dealt only with criminal matters; indeed, with the expiration of the statute of limitations for all other crimes, the Central Office investigated exclusively murder cases. And yet the Central Office has never enjoyed a basic authority granted to the OSI: to try its own cases. From its inception in 1958, the Central Office has served as an investigative agency only, able to prepare preliminary investigations but dependent on regional prosecutors to file charges and try cases. Partly as a result, of the 120,000 in-

vestigations launched by the Central Office since its creation, only 5,000 cases went to trial, resulting in fewer than 600 convictions.¹⁴ But trials there were; and the efforts of German investigators, prosecutors, and judges to bring perpetrators of Nazi atrocities to justice were no less remarkable than the obstacles thrown in their way.

By the start of Demjanjuk's trial in November 2009, however, the last prosecution to attract substantial media attention lay decades ago, and most Germans assumed that Nazi trials were a thing of the past. Many who previously had defended such trials now favored closing the book on this chapter of German history. And so the decision to bring Demjanjuk to Germany to stand trial made for surprise, even alarm. What exactly did Germany hope to achieve? Those most familiar with German case law openly predicted that the prosecution—if the aged defendant survived it—would end in failure.

And yet the trial, I will try to demonstrate, resulted in an important and even a historic success. If Nuremberg was a trial by document and the Eichmann and Ivan the Terrible cases were trials by survivor testimony, Demjanjuk's Munich trial was a trial by historical expert. Here the testimony of professional historians did much more than provide background and context to the crimes under consideration; rather, it enabled the resolution of the basic legal questions facing the court. Demjanjuk's Holocaust-as-History trial reflected more than the inescapable actuarial reality that the defendant was an old man and no survivors were around to identify him. It showcased the unusual role that historians had come to play in every aspect of atrocity cases, from the drafting of the indictment to the core of the court's judgment. While the Jerusalem trial of Ivan the Terrible marked the end of the Holocaust trial as a didactic exercise organized around survivor testimony, Demjanjuk's Munich case represented the advent of a very different kind of Holocaust trial: the Holocaust as History.

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In writing this book, I was drawn to many aspects of the Demjanjuk case. Primary among them were how the vectors of law and Cold War politics converged in Demjanjuk's trials, and how the case brought into stark relief the efforts of three different domestic legal systems to ad-

dress the crimes of the Holocaust. I was also interested in how the trial threw into stark relief the difference between treating Nazi extermination as a special challenge—one demanding legal innovation—and treating it as an ordinary crime. The manner in which the trial brought the prerogatives of memory and the conclusions of history into collision raised the question of how law treats the passage of time and handles the vexed issue of collaboration. Furthermore, I wanted to explore how legal systems develop and self-correct, how doctrine responds to the pressures of politics, and how law accommodates, digests, and frames the conclusions of history.

My interest was not with Demjanjuk the person. No one familiar with the case can seriously doubt that Demjanjuk served as a camp guard—not just at Sobibor, but at Majdanek and Flossenbürg, too. All the same, no evidence has ever been adduced to suggest that Demjanjuk distinguished himself by his cruelty, and I am prepared to believe that he did not. I can also readily imagine how, by the end of his life, he had come to view himself as a victim—of the Germans, who took him as a prisoner of war, impressed him into guard service, and ultimately brought him to trial; of the Israelis, who demonized and nearly executed him in a badly handled case of mistaken identity; and of the Americans, whose dogged determination to see him brought to justice must have looked like prosecutorial vindictiveness to an old man with deep reserves of self-pity. It is true that Demjanjuk never chose to be taken prisoner of war or assigned guard duty at a death camp. But life, particularly in times of historic upheaval, often thrusts us in situations not of our making. In such situations we must ask ourselves whether a difficult, or even terrible choice is the same as having no choice at all. Alas, in his stubborn and dissembling claim of absolute innocence, Demjanjuk deprived the law of a frank and nuanced reckoning with the meaning of his collaboration.

At the end of the day, I cannot say with assurance that, had I been a prosecutor on the case, I would have supported the decision to try Demjanjuk in Munich. But in writing about the trial, I find myself strongly supporting the verdict—not because I believe it was vital to punish Demjanjuk, but because the German court delivered a remarkable and just decision, one which few observers would have predicted from Germany's long legal struggle with the legacy of Nazi genocide.

In the following pages, I hope to convince you that the German trial did more than bring the bizarre and meandering case against Demjanjuk to a fitting close. It demonstrated the power of courts to self-correct and to learn from past missteps, offering a powerful example of how criminal trials can deploy history in a responsible way to shift and recenter doctrine. As we shall see, while still nominally treating the Holocaust as an “ordinary” crime, the Munich court managed to shatter the old paradigm and comprehend the Holocaust as a crime of atrocity. It is perhaps ironic that a man whom prosecutors first mistakenly pursued because of his alleged singular viciousness ultimately was convicted in Munich as the ultimate replaceable cog in an exterminatory machine. Yet as the court rightly recognized, a machine cannot run without its small constituent parts. Demjanjuk was rightly convicted not because he committed wanton murders, but because he worked in a factory of death. He was convicted of having been an accessory to murder for a simple and irresistible reason—because that had been his job.